Supreme Court, U.S.
FILED
DEC 18 2003

No. 03 902

In The

Supreme Court of the United States

LEO JOSEPH BABIN, JR.,

Petitioner,

v.

SHIRLEY ANN SCHILLING BABIN (Sylvia Darce),

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

MICHAEL R. HUBBELL
FRANK S. CRAIG, III
Counsel of Record for Leo Joseph Babin, Jr., Petitioner
BREAZEALE, SACHSE & WILSON, L.L.P.
P.O. Box 3197
One American Place, 23rd Floor
Baton Rouge, LA 70821-3197
Telephone: (225) 387-4000
Fax: (225) 381-8029

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether the trial court's application of the Louisiana Grandparent Visitation Statute, with the express goal to maintain a continuity with the family as being in the best interest of the children, without any requirement of allegations or proof by the grandparent of some serious circumstances, unconstitutionally placed the burden of proof on the parent, in violation of the Fourteenth Amendment to the United States Constitution, and contrary to this Court's ruling in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE PETITION	7
I. THE STATE COURT TRIAL JUDGE EMPLOYED A PRESUMPTION IN FAVOR OF GRANDPARENT VISITATION WITH THE EXPRESS GOAL OF MAINTAINING A CONTINUITY WITH THE FAMILY, WHICH IN EFFECT PLACED THE BURDEN OF PROOF ON THE FIT PARENT TO SHOW WHY THE VISITATION SHOULD NOT BE ALLOWED, CONTRARY TO THIS COURT'S DECISION IN *TROXEL*	7
II. AS A CONSTITUTIONAL MATTER, THE THRESHOLD REQUIREMENT OF SERIOUS CIRCUMSTANCES MUST BE SHOWN BEFORE THE COURT CAN INTERVENE IN THE PARENT/CHILD RELATIONSHIP	15
CONCLUSION	17
APPENDIX	
a. Notice of Judgment and Judgment of First Circuit Court of Appeal dated July 30, 2003	App. 1
b. Judgment of Trial Court dated October 25, 2001	App. 23

TABLE OF CONTENTS – Continued

Page

c. Minutes of Judge's Ruling from the Bench (September 26, 2001) dated October 5, 2001 ..... App. 25

d. Notice of Rendition of Judgment and Written Reasons signed on September 24, 2001..... App. 37

e. Judgment of the Supreme Court of Louisiana denying Petitioner's Application for Writ of Certiorari and/or Review dated September 24, 2003 ..... App. 41

f. Louisiana Legislature House Concurrent Resolution No. 68 (Regular Session, 2001)..... App. 42

g. Louisiana Legislature House Concurrent Resolution No. 38 (Regular Session, 2003)..... App. 45

h. Louisiana State Law Institute Report to the Louisiana Legislature ..... App. 47

i. Trial Court Minutes denying Petitioner's Motion for Involuntary Dismissal and Trial Court's Comments on Burden of Proof..... App. 51

j. Louisiana's Grandparent Visitation Statute, La. R.S. 9:344 ..... App. 55

TABLE OF AUTHORITIES

Page

CASES

Flack v. Dickson, 843 So.2d 1261 (La. App. 3d Cir. 2003) 17

Galjour v. Harris, 2000-2696 (La. App. 1st Cir. 3/28/01), 795 So.2d 350, writ denied, 2001-1238 (La. 6/1/01), 793 So.2d 1229, writ denied, 2001-1273 (La. 6/1/01), 793 So.2d 1230, and cert. denied, 122 S.Ct. 545, 151 L. Ed. 2d 422 (2001) 16

State in the Interest of S.M.W., C.D.W., C.N.W. and E.S.W., 781 So.2d 1223 (La. 2001) 15, 17

Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) ..... *passim*

Wood v. Wood, 2002-0860 (La.App. 1 Cir. 9/27/02), 835 So.2d 568, writ denied, 2002-2514 (La. 3/28/03), 840 So.2d 565 ..... 16, 17

CONSTITUTION AND STATUTES

Fourteenth Amendment to the U.S. Constitution, Section 1 ..... 2, 18

28 U.S.C. §1257(a) 1

La. R.S. 9:344 ..... 2, 7, 9, 13

OTHER

Louisiana Legislature House Concurrent Resolution No. 68 of the 2001 Regular Session 10

Louisiana Legislature House Concurrent Resolution No. 38 of the 2003 Regular Session 10

Louisiana State Law Institute Report to the Louisiana Legislature 10

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana denying Petitioner's Application for Writ of Certiorari and/or Review is recorded at 854 So. 2d 338. The opinion of the Louisiana First Circuit Court of Appeal is published at 854 So. 2d 403. The Louisiana State District Court's Ruling from the Bench is unpublished and is reprinted at Petitioner's Appendix ("Pet. App.") 25-36. The Louisiana trial court's Judgment and Written Reasons denying Petitioner's Exception of No Cause of Action based on Respondent's failure to allege serious circumstances to justify the court's intervention in the parent/child relationship is unpublished and is reprinted at Pet. App. 37-40. The Louisiana trial court's denial of Petitioner's Motion for Involuntary Dismissal at the conclusion of Respondent's case-in-chief, based on Respondent's failure to allege or prove any serious circumstances sufficient for the court to intervene in the parent/child relationship is unpublished, is contained in the trial transcript at pages 450 and 451, and is reprinted at Pet. App. 51-54.

JURISDICTION

The Louisiana Supreme Court denied Petitioner's Application for Writ of Certiorari and/or Review by Judgment entered September 24, 2003. This Court has jurisdiction to review the Louisiana Supreme Court's decision and the Louisiana First Circuit Court of Appeal's decision pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution in the context of application of Louisiana's Grandparent Visitation Statute (La. R.S. 9:344) under the facts of this case. The relevant part of the Fourteenth Amendment to the U.S. Constitution provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant part of La. R.S. 9:344 provides:

> If one of the parties to a marriage dies, is interdicted, or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted or incarcerated party without custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

The Louisiana statute is reprinted in full in the Appendix to this Petition, Pet. App. 55-56.

STATEMENT OF FACTS

Leo Joseph Babin, Jr. ("Leo") and Shirley Ann Schilling Babin ("Shirley") were married in 1981. Leo and Shirley adopted Michelle (now 15) in 1988. Joey (now 9) was born of the marriage between the parties in 1994. Leo and Shirley were divorced in 1998. They had joint custody of the two children, Michelle and Joey. After the divorce, the children lived with Shirley. Leo had liberal visitation.

Shirley was treated for kidney problems prior to, and during, the marriage. Her kidney problems got progressively worse. She became dependent on prescription drugs and ultimately died in May 2000. At that time, Leo assumed full physical custody of the children.

Sylvia Darce ("Sylvia") is Shirley's mother and the grandparent to Michelle and Joey. Sylvia was divorced in 1961 from Dwight Schilling. Of that marriage, she had two children, Debbie and Shirley. Sylvia remarried in 1974 to Lionel Darce and was divorced from him in 1992. Debbie and Shirley were raised by Sylvia and never knew their father as children. Debbie has 4 children of her own: Glen Jared (now 21); Amy (now 19); Claire (now 16); and Sarah (now 13). Sylvia has a good family relationship with Debbie and her husband, Glen. Sylvia and Debbie are very close. Sylvia has always had a full-time job, with the exception of a 2 year period approximately 14 years ago. When Sylvia is not working, she spends as much time with her grandchildren as possible. Sylvia has always had a good relationship with Debbie's husband, Glen.

Sylvia and Leo have always had their differences. Sylvia has undermined Leo's parental authority and has demeaned Leo in front of his children. This occurred prior to Leo's divorce from Shirley as well as after. Sylvia has her own ideas about what is best for Leo's children. After

Leo's divorce from Shirley, Sylvia and Leo had very little interaction. When they did interact, the interaction centered around conflict between them with respect to Leo's children.

Shirley was ever fearful that the children would be taken away from her because of her poor health condition. Shirley's declining health condition diminished her ability to adequately care for the children. After the divorce, and prior to Shirley's death, Leo attempted to convince Shirley that it was best for the children to live with him. Sylvia and Debbie intervened on behalf of Shirley and did whatever it took to oppose Leo's efforts to have the children live with him. Sylvia helped Shirley with the children when Sylvia was not working. Shirley would call on Leo on occasion in times of desperation.

After Shirley's death, despite his differences with Sylvia, Leo allowed Sylvia open visitation. Prior to her death, Shirley made Debbie and Glen beneficiaries of approximately $200,000 in life insurance proceeds and an IRA account, which Shirley received in the division of the community property with Leo upon divorce. It was always understood between Leo and Shirley that the children would be the beneficiaries of the money. Sylvia and Debbie refused to discuss with Leo the use of the money for the children relative to their future needs. Debbie told Michelle about the money without first discussing it with Leo. When Michelle wanted a cheerleading uniform that Leo could not afford, Michelle went to Debbie. Leo filed a petition in Shirley's succession proceeding seeking an accounting of the property that was intended for the children. As time went on, Sylvia continued to undermine Leo's parental authority. Sylvia had instructed Leo's children to lie to him prior to Shirley's death. Prior to her death, Shirley was in the hospital and Sylvia did not want

Leo to have the children during Shirley's hospital stay. After Shirley's death, Leo attempted to have a "family meeting" to discuss their differences relative to his children. Sylvia dismissed Leo's concerns as "garbage." Leo then restricted Sylvia's visitation to visitation in his home, in his presence.

Sylvia visited at Leo's home and the visits went well. Then, on one of the visits, without first consulting with Leo, Sylvia asked Joey to go with her to visit an aunt in a nursing home. An argument ensued when Sylvia questioned Leo in front of Joey. This was yet another incident of Sylvia's undermining Leo's parental authority. Sylvia decided she was not going to visit the children in Leo's home any longer, and filed a petition seeking visitation under Louisiana's Grandparent Visitation Statute. The conflict between Sylvia and Leo and the instances of Sylvia's undermining Leo's authority are in the trial court record.

Leo was remarried to Jeannie Babin in 1998. When Leo assumed full custody of the children after Shirley's death, the children were steadily progressing to a point where they considered Jeannie their "second mom."

Leo is concerned how his children are being influenced by Sylvia and Debbie with respect to basic morals and values that he has attempted to instill in his children. Leo is particularly concerned about Sylvia's (and Debbie's) influence on his children's relationship with him. The continued undermining of his parental authority cuts away at any positive progress Leo has made with his children.

After Shirley's death, Michelle developed a good relationship with her birth mother. After consultation with a professional psychologist, Leo decided that it was in Michelle's best interest for the birth mother to adopt Michelle. Michelle has been removed from the conflict

between Sylvia and Debbie, and Leo. Michelle's relationship with her birth mother is thriving.

Leo and Joey (now 9) have a very close father/son relationship. Leo has not wanted Joey subjected to Sylvia's negative influences. Leo wants to foster a "giving" attitude in Joey, and not Sylvia's "taking" attitude.

Leo has made repeated attempts to resolve the differences with Sylvia relative to his children. Sylvia repeatedly dismisses Leo's concerns as "garbage." It is Leo's belief, as the parent, that it is best for his children to be removed from the conflict with Sylvia, by not allowing visitation.

Sylvia has made no allegations nor provided any evidence that Leo is an unfit parent. Sylvia's basis for her claim to visitation is that she believes it is in her grandchildren's best interest.

Prior to trial, Leo filed an Exception of No Cause of Action based on Sylvia's failure to allege any serious circumstances to justify the court's intervention in his relationship with his children. The court denied Leo's Exception. After Sylvia rested her case, Leo asserted a Motion for Involuntary Dismissal, again based on Sylvia's failure to allege or prove any serious circumstances, sufficient for the court to intervene in Leo's relationship with his children. The court denied Leo's Motion. Leo appealed to the Louisiana First Circuit Court of Appeal on the basis of the trial court's unconstitutional application of the Louisiana Grandparent Visitation Statute. The Court of Appeal affirmed the trial court decision. Leo then applied for a Writ of Certiorari and/or Review to the Supreme Court of Louisiana, which was denied.

REASONS FOR GRANTING THE PETITION

I. The state court trial judge employed a presumption in favor of grandparent visitation with the express goal of maintaining a continuity with the family, which in effect placed the burden of proof on the fit parent to show why the visitation should not be allowed, contrary to this Court's decision in *Troxel*.

Like the Washington statute in *Troxel*, supra, the Louisiana grandparent visitation statute "places the best interest determination solely in the hands of the Judge". *Troxel*, 530 U.S. 57 at 67, 120 S.Ct. 2054 at 2061. "Should the Judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails." *Troxel*, 530 U.S. at 67, 120 S.Ct. at 2061.

At the conclusion of trial, the Louisiana trial court judge stated that under the Louisiana grandparent visitation statute, once Ms. Darce showed that the mother of the children has died, then the rest of the burden was that the Court must find that it was in the best interest of the children to allow the visitation. The trial judge stated:

> "I don't need a closing argument. I'm looking to Revised Statute 9:344, specifically visitation rights of grandparents and siblings, if one of the parties to a marriage dies, is interdicted, or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted, or incarcerated party without custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

> Mover has obviously carried her burden of proof in at least opening that door and that, in fact, one of the parties of the marriage has died in this case, the mother of the minor children. The rest of the burden, then, would be that the Court must find that it is in the best interest of the children to allow that visitation.

In *Troxel*, supra, this Court held that it was improper for the Washington Superior Court to apply a presumption in favor of grandparent visitation. The court stated at page 2062:

> "More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior Court judge explained:
>
> > 'The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, [sic] there are some issues or problems involved wherein the grandparents, their lifestyles, are going to impact adversely upon the children. That certainly isn't the case here from what I can tell.'"

This Court further stated:

> "In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that

> visitation would be in the best interest of her daughters."

In this case, the trial court judge employed a presumption in favor of grandparent visitation when she expressed her opinion that she wanted the children to have a continuity with the family, wanted them to know their grandmother, and wanted them to know their mother through their grandmother.

At the conclusion of the trial, the trial court judge expressed her personal opinion as follows:

> "I also, however, see your side of this situation, Ms. Darce, because I am also a firm believer that children need both parents and when they don't have both parents, then they need as much access to both sides of the family as is possible."

In granting visitation, the trial judge further expressed her goal to maintain a continuity with the family. The trial court judge stated:

> "The reason I say visitation is in the best interest of the children is because I want them to have a continuity with the family. I want them to know their grandmother. I want them to know their mom through the grandmother and that is a very positive burden that's put on you. It's not a negative burden. It will only undermine this entire process if you diminish Mr. Babin's authority, if you cut him down or belittle him in front of the children. This is not the point of my ordering this visitation."

Louisiana's grandparent visitation statute (La. R.S. 9:344) is constitutionally infirm. The statute provides no constitutional safeguards for recognition and protection of

fit parents' important fundamental right to make decisions concerning the care, custody, and control of their children. The statute does not reflect the rebuttable presumption of parental fitness, i.e. Leo's decisions regarding family relationships are the best decisions for his children and his family unit. The statute does not contemplate any actual or threatened harm to the child that must be prevented by grandparent visitation. The statute does not address the nature of the relationship between the grandparent and the child. Most importantly, the statute does not set forth the necessary allegations and proof required to override the parent's fundamental right to make decisions regarding family relationships. Rather, the statute leaves it up to the trial court judge (i.e., the State) to make a "better decision" than that made by the parent, by allowing the judge in his or her discretion, to determine what is in the best interest of the parent's children. By definition, the trial court judge "second guesses" a fit parent's decision. The Louisiana legislature itself has acknowledged that after *Troxel*, supra, Louisiana's statute may be unconstitutional in application to specific litigation. See House Concurrent Resolution No. 68 of the 2001 Regular Session, House Concurrent Resolution No. 38 of the 2003 Regular Session, and Louisiana State Law Institute Report attached as Pet. App. 42-44, Pet. App. 45-47, and Pet. App. 47-50, respectively.

In *Troxel*, this Court reaffirmed, as a matter of constitutional law, that there is a presumption that fit parents act in the best interest of their children:

> "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject

> itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." (citation omitted). *Troxel*, 530 U.S. at 68, 120 S. Ct. at 2061.

After listening to the testimony of all the conflicts between Leo and Sylvia (and Debbie), the trial judge concluded that Leo's termination of visitation was not justified, i.e., not in the best interest of his children. There was no expert testimony offered by Sylvia that lack of visitation with Sylvia would in any way be detrimental to Leo's children. In other words, Sylvia offered no expert testimony that visitation with Sylvia would be in the best interest of the children, notwithstanding Leo's decision to terminate the visitation. The decision was solely in the hands of the trial judge. The only expert testimony offered by Sylvia was in the abstract. Sylvia called Dr. Thomas Fain, a clinical psychologist, to testify that in general, it is always better to try to resolve conflict, than to turn away from it. Sylvia never tried to resolve the conflict with Leo. She repeatedly dismissed Leo's concerns as "garbage". As rebuttal, Leo offered testimony of Dr. MaryLou Kelly, also a clinical psychologist and also testifying in the abstract. Dr. Kelly testified that sometimes the conflict can be so overwhelming, that it would be in the children's best interest to eliminate the conflict by terminating all contact with the conflicted person.

The effect of the trial judge's firm belief and presumption that visitation of the children with the grandparent is a good thing for the children so that they would know their mother through their grandmother, was to give little weight to Leo's decision as a fit parent. The decisional framework utilized by the judge placed the burden of proof

on Leo to show the trial judge why the visitation would not be in the children's best interest. Rather than second guessing the actions and behavior of Sylvia in this case, the trial judge second guessed Leo's decision as a fit parent.

According to the trial judge, Sylvia met her burden by showing that Shirley, the mother of the children, had died. The trial judge stated that this opened the door and the rest of the burden was that the Court must find that it is in the children's best interest to allow the visitation. Sylvia's case in chief was based on Sylvia's self-serving testimony, the self-serving testimony of her relatives regarding her relationship with Leo's children and Sylvia's relationship with them, and the testimony of Sylvia's co-workers, coupled with Sylvia's denial of conflict with Leo. The trial judge concluded that Sylvia had shown by a preponderance of the evidence that visitation with Sylvia was in the best interest of Leo's children. The trial judge's conclusion is consistent with the trial judge's firm belief that when children don't have both parents, they need as much access to both sides of the family as possible. At that point, the trial judge placed the burden of proof on Leo to show why the visitation was not in the children's best interest. [See Pet. App. 51-54 trial court's comments on burden of proof]. Yet, Sylvia had no expert testimony specific to this case; nor did she show any detriment to the children. Without expert testimony, Sylvia (and the trial judge), can only rely on Sylvia's opinion (and the trial judge's firm belief) that her decision is a better decision than Leo's. The substance of Sylvia's testimony, as well as

that of her relatives and co-workers, was that Sylvia is a good grandmother, and there is no reason why she should not have visitation with Leo's children.[1] The basis of Sylvia's

---

[1] Sylvia's petition seeking grandparent visitation consists of the following allegations:

"11.

Petitioner loves her grandchildren and desires to have a close and continuing relationship with them. Therefore, Petitioner desires and respectfully requests that she be granted reasonable visitation with her grandchildren pursuant to Louisiana Revised Statute 9:344(A)."

Sylvia's petition also alleges that:

A. Sylvia and her extended family can provide a loving, supportive, active, and stable environment for the minor children.

B. Sylvia has a large home with a bedroom for each child, a large backyard and she is available on weekends to exercise visitation with her grandchildren.

C. Sylvia cared for the grandchildren while Shirley was receiving medical treatment before her death, and Sylvia spent a great deal of time with the grandchildren and was very involved in the children's school and extracurricular activities.

D. She does not intend to demean the relationship between the grandchildren and their father, but she wants to establish a close and loving relationship and feels that frequent time with her is in the children's best interest.

E. Leo is keeping the children away from the only family they have in Baton Rouge.

F. She strongly represents that it is in the best interest of the children to establish regular and frequent visitation with her.

G. Leo refuses to cooperate despite Sylvia's continued effort to negotiate a visitation schedule.

H. Leo has denied Sylvia access to the grandchildren, and has prohibited the children from having any contact

(Continued on following page)

claim for visitation is summed up in her trial testimony. Sylvia testified as follows:

"Q. Why do you want to have visitation with your grandchildren?

A. First of all, it is the best interest of the grandkids, especially after a deceased parent.

Q. Why do you think it's best for the children?

A. They need their extended family.

Q. Why do you think that that's so important in this situation?

A. Because there's just so many things that grandparents can do for them. Grandparents' love is just unlimited.

Q. Ms. Darce, do you have any desire to come between the children and their father?

A. No, Ms. Prater."

---

with their grandmother, aunt and uncle, or cousins on their mother's side.

I. Leo has blocked the grandmother's phone number from his home phone and his work numbers so she is unable to contact him or the grandchildren to discuss the matter.

J. Sylvia continually sends cards, letters and gifts to her grandchildren in an attempt to stay in contract with them and foster a loving relationship and stable environment, but she believes that Leo has failed to give these items to the grandchildren in order to demean her relationship with them.

K. On the few occasions she has had contact with Leo, he has been verbally abusive, hostile and offensive.

Operating from the presumption, pre-conceived notion, or bias that it is best for children to have contact with a grandparent so that they will know their mother through the grandmother, the trial judge also concluded that the judge's decision was a better decision than that of Leo's. As in *Troxel*, supra, there is no allegation or proof by Sylvia that Leo is not a fit parent. This case involves nothing more than a disagreement between a fit parent and a third party grandparent. Application of the Louisiana grandparent visitation statute in this manner is unconstitutional, and inconsistent with this Court's opinion in *Troxel*, supra.

II. As a constitutional matter, the threshold requirement of serious circumstances must be shown before the Court can intervene in the parent/child relationship.

The Louisiana Supreme Court has clearly recognized a parent's constitutionally protected fundamental right of privacy in *State in the Interest of S.M.W., C.D.W., C.N.W. and E.S.W.*, 781 So.2d 1223 at 1232 (La. 2001). Relying on *Troxel*, supra, in a case involving termination of parental rights, the Louisiana Supreme Court held:

> "The State's parens patriae power allows intervention in the parent-child relationship only under serious circumstances, such as where the State seeks the permanent severance of that relationship in an involuntary termination proceeding."

For a constitutional application of Louisiana's grandparent visitation statue in this case, the trial court judge should have incorporated a requirement for Sylvia to show some serious circumstances to justify the Court's ordering the

visitation. Without this constitutional safeguard, coupled with the trial judge's firm belief that the children should have visitation with their grandmother, Leo's constitutionally protected fundamental right, as a fit parent, to raise his children as he determines, was made secondary to the Court's desire for the children to visit with their grandmother.

There are conflicting decisions rendered by the Louisiana First Circuit Court of Appeal in grandparent visitation cases with respect to application of the constitutional principles enunciated in *Troxel*, supra. In *Galjour v. Harris*, 2000-2696 (La. App. 1st Cir. 3/28/01), 795 So.2d 350, writ denied, 2001-1238 (La. 6/1/01), 793 So.2d 1229, writ denied, 2001-1273 (La. 6/1/01), 793 So.2d 1230, and cert. denied, 122 S.Ct. 545, 151 L. Ed. 2d 422 (2001), the First Circuit Court of Appeal (Judge John T. Pettigrew) focuses on the specific facts of the case and whether the trial court was manifestly wrong in its determination of the best interest of the child. Whereas, in the case of *Wood v. Wood*, 2002-0860, (La.App. 1 Cir. 9/27/02), 835 So.2d 568, writ denied, 2002-2514 (La. 3/28/03), 840 So.2d 565, the First Circuit Court of Appeal (Judge Brady M. Fitzsimmons) focuses on the broader constitutional principles enunciated in *Troxel* with respect to non-parent visitation. The analysis used by the First Circuit Court of Appeal in *Galjour*, supra, and the analysis used by the First Circuit Court of Appeal in *Wood*, supra, are inconsistent. See also Judge Fitzsimmons' concurrence in this case with respect to the applicable constitutional analysis.

Although the First Circuit Court of Appeal, in this case, recites the constitutional principles in *Wood*, supra, the Court failed to apply those principles in this case. Rather, the First Circuit focused on the trial court's

decision on the "best interest of the child." As a constitutional matter, the First Circuit should have focused on Leo's fundamental right as a fit parent to make decisions regarding his children, without state interference. From a constitutional perspective, the proper inquiry is whether the grandparent has alleged and proven such serious circumstances sufficient to justify the exercise of the State's parens patriae power by intervening in the parent-child relationship. *State in the Interest of S.M.W., C.D.W, C.N.W. and E.S.W.*, 781 So.2d at 1232.

The constitutional analysis employed by the Louisiana First Circuit Court of Appeal in Leo's case also conflicts with the constitutional analysis used by the Louisiana Third Circuit Court of Appeal in *Flack v. Dickson*, 843 So.2d 1261 at p. 1264 (La. App. 3d Cir. 2003), in application of La. C.C. Art. 136(B). In *Flack*, the Court focuses on the constitutional principles enunciated in *Troxel*, supra. In Leo's case, the First Circuit Court of Appeal focuses on whether the trial court's decision on the "best interest of the child" was correct, without applying the constitutional principles enunciated in *Troxel*, supra, and as set forth in *Wood*, supra.

CONCLUSION

The burden of litigating this matter in and of itself has denied Leo his constitutionally protected right to raise his children as he sees fit. As the Washington Superior Court judge did in *Troxel*, supra, the trial court's firm belief, in this case, that grandparent visitation is in the best interest of the children, failed to provide any protection for Leo's fundamental constitutional right to make

decisions concerning the rearing of his own children. For the reasons stated in this Petition, it is respectfully requested that this Petition for Writ of Certiorari be granted, and after this Court's ultimate consideration of the case, that the judgments of the lower courts be reversed, as being in violation of Leo's fundamental right to make decisions concerning the care, custody, and control of his children under the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

MICHAEL R. HUBBELL
FRANK S. CRAIG, III
Counsel of Record for Leo Joseph Babin, Jr., Petitioner
BREAZEALE, SACHSE & WILSON, L.L.P.
P.O. Box 3197
One American Place, 23rd Floor
Baton Rouge, LA 70821-3197
Telephone: (225) 387-4000
Fax: (225) 381-8029

December 18, 2003

(SEAL)

Office Of The Clerk
Court of Appeal, First Circuit
State of Louisiana
www.la-fcca.org

Christine L. Crow
Clerk of Court

Post Office Box 4408
Baton Rouge, LA
70821-4408
(225) 342-1500
Phone Number Will Be Changed
8/7/2003 To (225) 382-3000

Notice of Judgment

July 30, 2003

Docket Number: 2002 - CA - 0396

LEO JOSEPH BABIN, JR.
versus
SHIRLEY ANN SCHILLING BABIN

TO: Lisa Michelle Prater Esq.
LEE & WALSH
628 North Boulevard
Baton Rouge, LA 70802

Michael Roy Hubbell Esq.
BREAZEALE, SACHSE & WILSON
One American Place, 23rd Floor
P.O. Box 3197
Baton Rouge, LA 70821-3197

Hon. Annette M. Lassalle
222 St. Louis Street, Room 978
Baton Rouge, LA 70801

You are hereby served with a copy of the opinion in the above-entitled case. Your attention is invited to Rule 2-18. Rehearing of the Uniform Rules of Courts of Appeal.

I hereby certify that this opinion and notice of judgment were mailed this date to the trial judge, all counsel of record, and all parties not represented by counsel as listed above.

/s/ [Illegible]
CHRISTINE L. CROW
CLERK OF COURT

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2002 CA 0396

LEO JOSEPH BABIN, JR.

VERSUS

SHIRLEY ANN SCHILLING BABIN

Judgment rendered JUL 30 2003

* * *

Appealed from the
Family Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 126,676
Honorable Annette M. Lassalle, Judge

* * *

MICHAEL R. HUBBELL BATON ROUGE, LA	ATTORNEY FOR PLAINTIFF-APPELLANT LEO JOSEPH BABIN, JR.
LISA M. PRATER BATON ROUGE, LA	ATTORNEY FOR DEFENDANT-APPELLEE SYLVIA DARCE

* * *

BEFORE: FITZSIMMONS, GUIDRY, and PETTIGREW, JJ.

Fitzsimmos, J. Concurs, and Assigns Reasons.

Guidry, G. concurs in the result.

PETTIGREW, J.

In this case, plaintiff seeks review of a judgment whereby the trial court granted visitation to the maternal grandmother, allowing her to spend four hours every three weeks with her deceased daughter's minor children. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Shirley Ann Schilling Babin ("Shirley") and Leo Joseph Babin, Jr. ("Leo") were married on May 9, 1981. In 1988, Leo and Shirley adopted one child, Michelle Lynn Babin ("Michelle"), who was born on March 14, 1988. Leo Joseph Babin, III ("Joey") was born of the marriage on September 19, 1994. In December 1997, Leo filed for divorce, and the parties entered into a stipulation as to various ancillary matters. The parties agreed to joint custody of the children, with Shirley being designated as the domiciliary parent. Leo and Shirley were later divorced in July 1998. During the parties' separation and after the divorce, Michelle and Joey remained in Shirley's custody, with Leo exercising reasonable visitation.

According to the record, Shirley had a long history of severe health problems, including two kidney transplants, liver failure, heart problems, and numerous hospitalizations and surgeries. As a result of these health problems, Shirley developed an addiction to prescription drugs, requiring treatment on several different occasions at both in-patient and out-patient treatment facilities. On May 15, 2000, Shirley passed away. Immediately following Shirley's death, Leo assumed sole physical custody of his children.

On March 21, 2001, Sylvia Darce, Michelle and Joey's maternal grandmother, filed a rule to establish grandparent visitation, seeking to maintain the "close and loving relationship" she had with her grandchildren prior to Shirley's death. According to Sylvia's petition, she had been unsuccessful in her attempts to negotiate a visitation schedule with Leo, who, in Sylvia's opinion, was doing everything possible to "demean her relationship with her grandchildren." Sylvia requested "reasonable visitation" with her grandchildren pursuant to La. R.S. 9:344.

Leo filed an answer to Sylvia's petition for grandparent visitation, including in same exceptions raising the objection of no cause of action based on (1) the unconstitutionality of La. R.S. 9:344, on its face and as applied to the facts of this case, and (2) Sylvia's failure to make an allegation of "serious circumstances" sufficient for the state to exercise its *parens patriae* power by intervening in the parent-child relationship. The matter proceeded to trial on June 25 and 27, 2001, at which time the court ruled on the constitutional issue, denying Leo's no cause of action exception based on the facial unconstitutionality of La. R.S. 9:344. The court pretermitted ruling on Leo's exceptions based on the constitutionality of La. R.S. 9:344 as applied to the facts of the case and based on the failure to allege "serious circumstances."

After two days of trial, the matter was held over until September 24 and 26, 2001, for the introduction of further testimony. Prior to the trial resuming on September 24, 2001, Leo filed a motion for involuntary dismissal, which was denied as premature. Moreover, on September 24, 2001, the court issued written reasons for judgment, denying Leo's objection of no cause of action based on the failure to allege "serious circumstances." The court found

that Sylvia was not required, either by statute or jurisprudence, to allege or prove "serious circumstances" in order to prevail in her rule for grandparent visitation. The court also ruled on the appropriate burden of proof required in this case, noting that Sylvia was required to prove, by a preponderance of the evidence, that visitation would be in the best interest of the children.

During the four-day trial of this matter, the trial court considered documentary evidence and the testimony of numerous witnesses in deciding what was in the best interest of Michelle and Joey relative to Sylvia's request for grandparent visitation. Sylvia testified at length concerning her involvement in her grandchildren's lives both before and after Shirley's death in 2000. When asked about her relationship with Michelle and Joey before Shirley and Leo separated, Sylvia responded, "I was a grandmother to them. I loved them. We did things together. I was a part of their life." Shirley indicated that during that time, she was enjoying retirement and was able to spend a lot of time with the children. When Shirley and Leo separated in 1997, Sylvia testified that she spent as much time as possible with the children. Although she had returned to work at that time, she would check in with Shirley and the children daily to be sure that things were taken care of. Sylvia indicated that in addition to taking care of things around the house like cooking, cleaning, and laundry, she would also spend time with the children shopping, going to church, and playing games.

After Shirley's death in May 2000, the children began living with Leo. Although Sylvia and other members of Shirley's family were initially allowed open and liberal visitation with the children, this changed several months

later when Leo began to place restrictions on the visitation. Sylvia described a very strained relationship with Leo during this time and indicated that her visitation with the children, which became very limited, took place only at Leo's home and under his supervision. Sylvia was not allowed any overnight visitation and was told not to call the children. In fact, Sylvia testified that her phone number was blocked on Leo's home phone such that she could not even contact Leo without calling him at work. Sylvia also testified about a letter Leo sent her outlining, as she described it, "all [her] misguidings, all [her] faults, how bad of a time he had with Shirley and how [Sylvia had] influenced Michelle for 12 years." According to Sylvia, this change in Leo's attitude was due largely in part to the fact that Shirley's last will and testament named her sister and brother-in-law, Debbie and Glen Smith, as beneficiaries to an IRA and life insurance policy, the only real assets left by Shirley at her death. Shirley's will also established a trust for Michelle and Joey, with Debbie Smith named as trustee.

Leo testified that initially following his divorce from Shirley, he had liberal visitation with the children and would see them every other weekend. However, according to Leo, as time progressed, Michelle stopped visiting with him on a regular basis. When Shirley's health began to deteriorate, Leo indicated he was concerned that Shirley could not handle the demands of raising the children. He would often talk to Shirley and Sylvia about the children coming to live with him. Leo stated he even considered filing for custody of the children but ultimately did not because he believed it would "destroy" Shirley as the children were "keeping her alive."

Following Shirley's death, the children began living with Leo, but visitation with Shirley's family was "open." Leo indicated this "open" visitation continued through July, when things between he and Sylvia and Debbie became "uncomfortable." According to Leo, he was concerned about his children's financial future and continually asked Debbie for a copy of Shirley's will. Leo eventually retained the services of a lawyer and was able to secure a copy of the will.[1] Noting that problems escalated concerning the money Shirley left for the children, Leo described a strained relationship with Shirley's family. Leo believed Sylvia and Debbie were using the money to "drive a wedge between [him] and [his] children."

Leo stated that when the children would return from visitation with Sylvia, they were both "very undisciplined." He began placing restrictions on Sylvia's visitation with the children in September 2000. Leo testified about a letter he sent in September 2000, to Sylvia, Debbie and Glenn Smith, and Lorraine Andresen-McCormick, the succession attorney. He described the letter as "outlining a number of concerns [he] had having to do with the children's spiritual values, the way they were raised, the way they were disciplined, the things that happened to Shirley that they were exposed to, things that [he] felt needed explanation, the fact that the money was not in a trust." When asked what conditions he placed on the visitation at that point, Leo responded:

---

[1] Although not an issue before us now, we note from the record that Leo initiated a succession proceeding involving Shirley's estate, making various accusations about Debbie's Smith's management of the succession.

> I said okay, for now the phone will stay blocked. For now, it will be one person at a time. For now, Sylvia will be the person and you may call me at work and let me know when you'll be by. You're to bring no gifts and no money. You're to visit with Joey and Michelle by talking and playing with them, going to their rooms, let them show you stuff, ask them about school, find games to play or projects to work on.

Leo indicated Sylvia visited with the children two or three times after this letter, but visitation was completely stopped in November 2000. Asked what his reasons were for terminating Sylvia's visitation rights, Leo stated, "She puts her own concerns ahead of others."

Leo's September 20, 2000 letter, which spans over thirty pages, was introduced into evidence for the trial court's consideration. Noting that he is the "parent, guardian and natural tutor" of his children, Leo stated in this letter that Debbie should "have been honest and forthcoming about the fate of Shirley's estate by informing [him] as to what would happen regarding [his] children's financial future." Leo continued, adding that Debbie's "reluctance to disclose information pertinent to [his] children's future, has set a belligerent and non-cooperative tone to these proceedings."

After considering all of the evidence introduced in this case, the trial court rendered oral reasons for judgment, finding visitation with Sylvia to be in the best interest of the children. The court ordered both Sylvia and Leo to attend counseling with Dr. Allen Taylor and granted Sylvia visitation with the children to start out at four hours every three weeks, working around the children's schedules. The court further noted that any variation in

this visitation schedule would depend on recommendations made by Dr. Taylor. A judgment in accordance with these findings was signed by the trial court on October 25, 2001.

It is from this judgment that Leo has appealed, assigning the following specifications of error: [2]

> 1. The trial court erred as a matter of constitutional law in its application of the Louisiana Grandparent Visitation Statute (La. R.S. 9:344(A)) by refusing to require a threshold showing of "serious circumstances" to justify the court's intervention in the parent/child relationship with consideration to Appellant's constitutionally protected fundamental right of privacy.
>
> 2. The trial court erred as a matter of constitutional law in its application of the Louisiana Grandparent Visitation Statute (La. R.S. 9:344(A)) by refusing to require a clear and convincing burden of proof of (i) "serious circumstances" sufficient to justify the court's intervention in the parent/child relationship and (ii) that such visitation is in the best interest of the children,

---

[2] Leo also assigns error to the trial court's denial of his peremptory exception raising the objection of no cause of action and his motion for involuntary dismissal. The judgments denying both of these requests are interlocutory in nature and generally not appealable. However, when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory rulings prejudicial to him, in addition to the review of the final judgment. *See* **Landry v. Leonard J. Chabert Medical Center**, 2002-1559, p. 5 n.4 (La. App. 1 Cir. 5/14/03), ___ So.2d ___, n.4. Nonetheless, having found no merit to Leo's argument concerning these judgments, and for the reasons set forth more fully below, no further discussion of same is warranted.

in light of Appellant's constitutionally protected fundamental right of privacy.

STANDARD OF REVIEW

Every child custody case must be viewed in light of its own particular set of facts. **Dettman v. Rablee**, 2001-1228, p. 5 (La. App. 1 Cir. 9/28/01), 809 So.2d 373, 377. The trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. **Bercegeay v. Bercegeay**, 96-0516, p. 5 (La. App. 1 Cir. 2/14/97), 689 So.2d 674, 676. The trial court is vested with vast discretion in matters of child custody and visitation. Accordingly, its determination regarding same is entitled to great weight and will not be disturbed on appeal unless an abuse of discretion is clearly shown. **Stephens v. Stephens**, 2002-0402, p. 4 (La. App. 1 Cir. 6/21/02), 822 So.2d 770, 774.

In the instant case, as in most custody cases, the trial court's determination was based heavily on factual findings. As an appellate court, we cannot set aside the trial court's factual findings unless we determine that there is no reasonable factual basis for the findings and the findings are clearly wrong (manifestly erroneous). **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Furthermore, when factual findings are based on the credibility of witnesses, the fact finder's decision to credit a witness's testimony must be given "great deference" by the appellate court. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Thus,

when there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, although the appellate court may feel its own evaluations and inferences are as reasonable. **Id.**

DISCUSSION

Relying on the Supreme Court's decision in **Troxel v. Granville**, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), Leo challenges the constitutionality of La. R.S. 9:344 and argues that clear and convincing evidence of "serious circumstances" must be presented before grandparent visitation can be awarded. As is discussed more fully below, this court has previously concluded that La. R.S. 9:344 does not violate the constitutional protections afforded parents. Moreover, we agree with the trial court that Sylvia was not required to allege or prove "serious circumstances" in order to prevail in her rule for grandparent visitation pursuant to La. R.S. 9:344. Accordingly, we find no merit to Leo's arguments on appeal.

Recently, in **Wood v. Wood**, 2002-0860, pp. 4-6 (La. App. 1 Cir. 9/27/02), 835 So.2d 568, 571-572, *writ denied*, 2002-2514 (La. 3/28/03), 840 So.2d 565, this court addressed the Supreme Court's holding in **Troxel**:

> In *Troxel,* the Supreme Court recognized that one of the byproducts of the changing infrastructure of society at large, and the family unit in particular, is an accommodation in the law for extending visitation to nonparents. While recognizing many benefits of this practice, the Supreme Court rejected any visitation scheme that trampled upon the sacred and paramount rights of a fit parent

to dictate the best interests of his or her children. *Troxel,* 530 U.S. at 63-67, 120 S.Ct. at 2059-61.

Specifically, *Troxel* involved a request by paternal grandparents, following the death of their son, for visitation with two granddaughters born of the relationship between their son and a companion whom he never married. *Troxel,* 530 U.S. at 60, 120 S.Ct. at 2057. The girls' mother did not oppose all visitation, but objected to the amount sought by the Troxels. *Troxel,* 530 U.S. at 61, 120 S.Ct. at 2058. The Troxels' request for visitation was made under authority of a Washington statute. The statute provided that: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." *Troxel,* 530 U.S. at 61-62, 120 S.Ct. at 2057-8. The United States Supreme Court found the Washington statute "breathtakingly broad" and declared it unconstitutional as applied. *Troxel,* 530 U.S. at 67 & 73, 120 S.Ct. at 2060-61 & 2064. In doing so, the justices placed particular emphasis upon parents' constitutionally protected fundamental right to make decisions concerning their children, the presumption that parents act in the best interest of their children, and the failure of the Washington statute or court to give some "material" or "special" weight to the parent's own determination on the issue of visitation. *Troxel,* 530 U.S. at 65-72, 120 S.Ct. at 2060-63. The Supreme Court noted that the contested statute rendered a custodial parent effectively voiceless in deciding what is in the child's best interest,

> while simultaneously extending unfettered discretion to the trial judge to make such a determination. In the opinion of the *Troxel* court, the Washington statute allowed the trial judge to "disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Troxel,* 530 U.S. at 67, 120 S.Ct. at 2061.

Subsequent to the **Troxel** decision, this court confronted the issue of nonparent visitation in the context of Louisiana's two controlling provisions; i.e., La. Civ. Code art. 136[3] and La. R.S. 9:344. In **Galjour v. Harris**, 2000-2696, p. 9 (La. App. 1 Cir. 3/28/01), 795 So.2d 350, 356, *writs denied,* 2001-1238, 2001-1273 (La. 6/1/01), 793 So.2d 1229, 1230, *cert. denied,* 534 U.S. 1020, 122 S.Ct. 545, 151 L.Ed.2d 422 (2001), one of the issues raised was the constitutionality of La. R.S. 9:344, which provides, in pertinent part, as follows:

> A. If one of the parties to a marriage dies, is interdicted, or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted, or incarcerated party without custody of such minor child or children may have *reasonable* visitation rights to the child

---

[3] Louisiana Civil Code article 136 provides, in pertinent part, for visitation by nonparents as follows:

> B. Under extraordinary circumstances, a relative, by blood or affinity, or a former stepparent or stepgrandparent, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. . . .

> or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the *best interest* of the child or children. [Emphasis added.]

In upholding the constitutionality of La. R.S. 9:344, this court concluded that the Louisiana statute was more narrowly drawn than the Washington statute at issue in **Troxel** and did not violate due process.

> The Louisiana legislature has determined that in specified, limited situations, i.e., where one parent dies, is interdicted, or incarcerated, the *parents* of the deceased, interdicted, or incarcerated party *may* have *reasonable* visitation rights with the children *provided* the court finds said visitation to be in the best interest of the child. Unlike the Washington statute, the Louisiana legislature expressly limited the scope of La. R.S. 9:344 to the parents of the deceased or absent parent. Additionally, the statute's grant of visitation does not contemplate a significant intrusion upon the child's relationship with the other parent or interference with said parent's fundamental right to make childrearing decisions.

Galjour, 2000-2696 at 11, 795 So.2d at 358 (emphasis in original).

In **Galjour**, this court recognized that the legislature eliminated the burden of showing "extraordinary circumstances," as is required under La. Civ. Code art. 136(B), when the non-custodial parent is dead, interdicted, or incarcerated. **Galjour**, 2000-2696 at 7, 795 So.2d at 355. In essence, the legislature made the determination, rather than the court, that the death, interdiction, or incarceration of a parent qualified as "extraordinary circumstances." Although the nonparent is relieved of one

burden, the nonparent must nevertheless show that the requested visitation is "reasonable" and in the "best interest" of the children. La. R.S. 9:344(A).

Moreover, with regard to the application of La. R.S. 9:344, this court has held there must be a balancing between the provisions of state laws and the constitutional protections afforded parents.

> When granting or modifying visitation to a nonparent, the trial court must exercise care not to apply either Civil Code art. 136 or La. R.S. 9:344 in a vacuum. Instead, the trial judge must balance these state provisions against a fit parent's constitutionally protected fundamental right of privacy in child rearing, and remember that any rights of nonparents are ancillary to that of a fit parent. *Troxel,* 530 U.S. at 65-73, 120 S.Ct. at 2060-64; *Reinhardt v. Reinhardt,* 97-1889, p. 5 (La. App. 1 Cir. 9/25/98), 720 So.2d 78, 80, *writ denied,* 98-2697 (La.12/18/98), 734 So.2d 635, *cert. denied,* 526 U.S. 1114, 119 S.Ct. 1761, 143 L.Ed.2d 792 (1999). The burden of proof is properly placed on the mover, the nonparent, to meet the legislative best interest requirement. It is the court's responsibility to balance state requirements with constitutional protections. In considering the best interest of the child, the trial court must be aware that as nonparent visitation increases, the infringement and burden on the parent's fundamental right of privacy in child rearing increases proportionally. Visitation that unduly burdens parental rights would be unconstitutional, regardless of the provisions of statutory law. [*Reinhardt,* 97-1889 at 5, 720 So.2d at 80.]

Wood, 2002-0860 at 8-9, 835 So.2d at 573.

In granting visitation to Sylvia in the instant case, the trial court offered the following oral reasons for judgment:

> The reason I say visitation is in the best interest of the children is because I want them to have a continuity with the family. I want them to know their grandmother. I want them to know their mom through the grandmother and that is a very positive burden that's put on you. It is not a negative burden. It will only undermine this entire process if you diminish Mr. Babin's authority, if you cut him down or belittle him in front of the children. That is not the point of my ordering this visitation.
>
> Because of what's happened in the past, it's very obvious that the visitation – and I do think and I know that you said no, Mr. Babin, but I do think that the money triggered all of this. I don't think that it's a coincidence that the visitation cut off in August and your letter to Ms. Andresen-McCormick came in September, and I've looked through the entire document . . . and it just comes through loud and clear that the money was the trigger. It may very well be and this is pretty much my take on it, that the money was the last straw to you; that you saw that as the family was just going to run it their way and they were taking the money and they were going to do with the money what they wanted to do and you saw that as the final straw. That may be how it went, but in any event, it was the money.
>
> With that said, visitation with the minor children has to start slowly because I'm ordering counseling and therapy for each of you. It has to be for the best interest of the children since my goal is to have these children have what is best

> for them. It's obvious to me it's not going to happen without some type of counseling. . . .
>
> Visitation starts off at four hours. It can increase as Dr. Taylor recommends. My goal would be to be at an overnight visitation within six months with the grandparents. The four hours at this point . . . would be every three weeks. It would be on a weekend . . . [and] around the children's schedule . . . .

We have thoroughly reviewed the testimony in the record and the documentary evidence introduced by the parties in the instant case. The standard of review requires that great deference be given to the trier of fact's findings when those findings are based on determinations regarding credibility of witnesses. **Rosell**, 549 So.2d at 844. Based on the extensive testimony from Sylvia regarding the length and quality of the relationship she enjoyed with her grandchildren prior to Shirley's death, and considering the vast discretion given to the trial court, we cannot say the trial court abused its discretion in awarding visitation to Sylvia.[4] The trial court was careful to limit the visitation so as not to be a significant intrusion upon the children's relationship with their father. Moreover, the

---

[4] Sylvia alleges in brief that shortly after the trial court rendered judgment in this case, Leo relinquished his parental rights as to Michelle to Michelle's biological mother. There was also mention of same by Sylvia's counsel during oral arguments before this court. The record is void of any evidence to support this allegation. We note, however, that if Leo has taken this action with regard to his parental rights as to Michelle, then Michelle's biological mother becomes an indispensable party to this action. Thus, Sylvia may need to pursue further legal action to secure any future visitation with Michelle.

court was adamant that Sylvia not do anything to diminish Leo's authority over the children or undermine his ability to raise the children as he sees fit. Under these circumstances, we do not find that the trial court erred in its determination that visitation with Sylvia was in the children's best interest. Leo's arguments to the contrary are without merit.

CONCLUSION

For the above and foregoing reasons, the judgment of the trial court is affirmed. All costs associated with this appeal are assessed against plaintiff/appellant, Leo Joseph Babin, Jr.

AFFIRMED.

LEO JOSEPH BABIN, JR.

VERSUS

SHIRLEY ANN SCHILLING BABIN

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2002 CA 0396

FITZSIMMONS, J., concurs, and assigns reasons.

FITZSIMMONS, Judge, concurring, with reasons.

This is not a dispute between two parents who have an equal right to decide how the child will be raised. The parents' right to make decisions, such as who the child will see or where the child will live, is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. **Troxel v. Granville**, 530 U.S. 57, 65-66 & 72-73, 120 S.Ct. 2054, 2060 & 2064, 147 L.Ed.2d 49 (2000). Before a parent's right to choose his children's visitors can be infringed, Louisiana Revised Statutes 9:344 A requires a "best interest" analysis. If visitation is granted to extended family, it must be "reasonable" and not overly intrusive of the parent's right to make decisions for his child. La. R.S. 9:344 A; **Wood v. Wood**, 2002-0860, pp. 8-9 (La. App. 1 Cir. 9/27/02), 835 So.2d 568, 573, *writ denied,* 2002-2514 (La. 3/28/03), 840 So.2d 565. Although the factors listed in Civil Code articles 134 and 136 may be helpful in conducting a "best interest" analysis, the trial court must conduct the analysis in light of the constitutional protections enunciated by the United States Supreme Court in **Troxel v. Granville**, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

Parents, not grandparents, are entitled to a presumption that they act in the "best interest" of their children.

Troxel, 530 U.S. 57, 68, 120 S.Ct. 2054, 2061, 147 L.Ed.2d 49 (2000). If a parent provides reasonable care for his child, "there will normally be no reason for the State to inject itself into the private realm of the family . . . concerning the rearing of that parent's children." **Troxel**, 530 U.S. at 68-69, 120 S.Ct. at 2061. Thus, in deciding whether grandparent visitation is in the "best interest" of the child, the trial court must afford the objection of the parent "special weight." **Troxel**, 530 U.S. at 70, 120 S.Ct. at 2062. Perhaps more importantly, a finding by the trial court that grandparent or extended family visitation is simply a "better" decision, than the decision of the parent to object, is not constitutionally valid. **Troxel**, 530 U.S. at 72-73, 120 S.Ct. at 2064.

For these reasons, I believe that the grandmother's burden was to overcome the presumption in favor of the parent's objection to visitation and show why the visitation was in the best interest of the children. From my review of this particular record, in light of the constitutional mandates of **Troxel**, I find this case to be a very close call. However, after considering the particular circumstances: the death of the mother, the established relationship of the grandmother with the children, and the trial court's findings concerning some of the father's motives for objecting, I respectfully agree with the result. My hesitation stems from my belief that this court, as an instrument of the State, must exercise restraint before interfering in child rearing decisions by parents. Of particular concern here is the trial court's plan, despite a strong parental objection, for future substantial increases in visitation based on the report of a psychologist. In my opinion, extended visitation under the facts here would be overly intrusive and could not pass constitutional muster.

Emotionally, most would agree with the trial court that family continuity is better for a child and believe that extended family can enrich a child's life. However, we also would not hesitate to recognize a parent's right to move to another state with his children; a decision that would also interrupt family continuity. The parent's decision on who his child may visit, including extended family, stems from the same parental right as the decision to move or to choose a particular school. Though painful to the grandparent and the child, that authority should not be infringed by the State based solely on the trial court's belief in the benefits of an extended family and that visitation is a "better" decision for the child. More must be required as a basis for a grant of visitation in the face of an objection by a fit parent, and limited visitation must be the standard.

Finally, I raise the question of the validity of requiring parents to undergo intrusive counseling whenever a third party seeks to force visitation upon a non-consenting parent. Admittedly, the trial court sees from the pinnacle view. However, in the absence of a troubled child or family, I fear that automatic orders of counseling or testing for the parent impinges upon, or even has a chilling effect on, the parent's right to make child rearing decisions. If the third party has the burden of proof, should not a prima facie showing be a threshold requirement before the parent must undergo psychological testing? Without good cause, such testing may impermissibly impinge upon not only the parent's fundamental right to raise his child, but also on the parent's own right to privacy.

LEO JOSEPH BABIN, JR.	**NUMBER: 126,676; DIVISION: "D"**
VERSUS	**THE FAMILY COURT**
SHIRLEY ANN SCHILLING BABIN	**PARISH OF EAST BATON ROUGE**
	STATE OF LOUISIANA

JUDGMENT

(Filed Oct. 25, 2001)

This matter came up on regular assignment for trial on June 25th, June 27th, September 24th and September 26th, 2001 on the Petition of Sylvia Darce Seeking Grandparent Visitation Rights Pursuant to La. R.S. 9:344. Present in Court were Sylvia Darce and her attorney, Lisa M. Prater and Leo Joseph Babin, Jr., and his attorney, Michael R. Hubbell. After considering the pleadings, the law, the evidence and the arguments of counsel, the Court made the following ruling:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that both parties, Sylvia Darce and Leo Joseph Babin, Jr. shall attend counseling and therapy with Dr. Allen Taylor to establish a working relationship for visitation of the grandmother, Sylvia Darce, with the minor children, Michelle Lynn Babin and Leo Joseph Babin, III, said visitation to start out at four (4) hours every three (3) weeks, working around the minor children's schedules, with the details of arrangements to be left up to Dr. Taylor, based on his counseling/therapy sessions with the parties.

JUDGMENT RENDERED on the 26th day of September, 2001.

JUDGMENT READ AND SIGNED in chambers on the 25th day of Oct., 2001.

/s/ Annette M. Lassalle
JUDGE ANNETTE M. LASSALLE,
THE FAMILY COURT

APPROVED AS TO CONTENT AND FORM:

LEE & WALSH
257 Maximillian Street
Baton Rouge, Louisiana 70802
Telephone: (225) 344-0474
Telecopier: (225) 344-9124

/s/ Lisa M. Prater
Lisa M. Prater
(Bar Roll No. 25216)
Attorneys for Sylvia Darce

BREAZEALE, SACHSE & WILSON, L.L.P.
One American Place, 23rd Floor
Baton Rouge, Louisiana 70825
Telephone: (225) 387-4000
Telecopier: (225) 381-8029

/s/ Michael R. Hubbell
Michael R. Hubbell
(Bar No. 18265)
Attorneys for Leo Joseph Babin, Jr.

THE FAMILY COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

DIVISION D

LEO JOSEPH BABIN, JR.

VERSUS **126,676**

SHIRLEY SCHILLING BABIN

JUDGE'S RULING FROM THE BENCH

WEDNESDAY, SEPTEMBER 26, 2001

THE HONORABLE ANNETTE M. LASSALLE, JUDGE PRESIDING

(Filed Mar. 13, 2002)

APPEARANCE:	**FOR:**
MICHAEL R. HUBBELL	**PLAINTIFF**
LISA PRATER	**DEFENDANT**

REPORTED BY: CHRIS B. RHODUS, R.P.R., C.C.R.

[2] (JUDGE'S RULING)

THE COURT: I DON'T NEED A CLOSING ARGUMENT. I'M LOOKING TO REVISED STATUTE 9:344, SPECIFICALLY VISITATION RIGHTS OF GRANDPARENTS AND SIBLINGS, IF ONE OF THE PARTIES TO A MARRIAGE DIES, IS INTERDICTED, OR INCARCERATED, AND THERE IS A MINOR CHILD

OR CHILDREN OF SUCH MARRIAGE, THE PARENTS OF THE DECEASED, INTERDICTED, OR INCARCERATED PARTY WITHOUT CUSTODY OF SUCH MINOR CHILD OR CHILDREN MAY HAVE REASONABLE VISITATION RIGHTS TO THE CHILD OR CHILDREN OF THE MARRIAGE DURING THEIR MINORITY, IF THE COURT IN ITS DISCRETION FINDS THAT SUCH VISITATION RIGHTS WOULD BE IN THE BEST INTEREST OF THE CHILD OR CHILDREN.

MOVER HAS OBVIOUSLY CARRIED HER BURDEN OF PROOF IN AT LEAST OPENING THAT DOOR AND THAT, IN FACT, ONE OF THE PARTIES OF THE MARRIAGE HAS DIED IN THIS CASE, THE MOTHER OF THE MINOR CHILDREN. THE REST OF THE BURDEN, THEN, WOULD BE THAT THE COURT MUST FIND THAT IT IS IN THE BEST INTEREST OF THE CHILDREN TO ALLOW THAT VISITATION.

I WANT A NOTE FROM THE ONSET THAT IT HAS, AS I'VE SAID, BEEN A VERY LONG DAY. MY ONLY BREAK WAS A WORKING LUNCH BREAK WITHOUT THE BENEFIT OF ACTUALLY EATING LUNCH, AND I HAVE A NUMBER OF REASONS FOR MY RULING. I WILL BE BRIEFER THAN USUAL ONLY BECAUSE I AM VERY TIRED; BUT I FEEL SO STRONGLY THAT THERE HAS TO BE SOME FINALITY AND SOME IMMEDIATE RESOLUTION IN THIS CASE THAT IT IS FOR THAT REASON THAT I'M RULING AS TIRED AS I AM, BUT I ALSO WILL EXPLAIN WHY MY RULING WILL PROBABLY NOT BE AS LENGTHY AS I FEEL IS JUSTIFIED [3] BY THE SITUATION.

LET ME START BY SAYING THAT I SEE VERY CLEARLY EACH SIDE OF THE ISSUE. I AM A FIRM

BELIEVER IN PARENTAL AUTHORITY AND PARENTAL RIGHTS, MR. BABIN. I CAME FROM A FAMILY WHERE MY DAD WHIPPED ME WITH A BELT AND MY MOTHER BROKE A HAIR BRUSH ON MY BUTT BECAUSE, APPARENTLY, I WAS A VERY STRONG-WILLED LITTLE INDIVIDUAL. SO I DON'T WANT YOU TO THINK THAT I, IN ANYWAY, UNDERESTIMATE OR DO NOT VALUE YOUR AUTHORITY AS A PARENT. AND YOU DO HAVE IT IN AUTHORITY THAT IN THIS COURT'S OPINION DOES PRIME THE AUTHORITY OF THE GRANDPARENT. SO I WANT TO SAY THAT FROM THE ONSET.

I ALSO, HOWEVER, SEE YOUR SIDE OF THIS SITUATION, MS. DARCE, BECAUSE I AM ALSO A FIRM BELIEVER THAT CHILDREN NEED BOTH PARENTS AND WHEN THEY DON'T HAVE BOTH PARENTS, THEN THEY NEED AS MUCH ACCESS TO BOTH SIDES OF THE FAMILY AS IS POSSIBLE.

THIS IS A VERY, VERY SAD CASE TO ME AND THIS, TO ME, JUST DIDN'T REALLY COME OUT IN THE TESTIMONY, BUT THESE CHILDREN JUST LOST THEIR MOTHER. I MEAN, THEY'RE DEALING WITH THAT GRIEF. THEY DON'T NEED THE ADDITIONAL GRIEF OF LOSING ANY RELATIVES THAT THEY HAD AT THE BEST POINT IN THEIR LIFE. NOT JUST MS. DARCE BUT ANY OF THEIR RELATIVES.

AND, AGAIN, MR. BABIN, I DON'T WANT YOU TO THINK THAT I DON'T FOR A SECOND HEAR YOUR CONCERNS. AND I WILL GET TO THAT. BECAUSE I DO HEAR YOUR CONCERNS, AND I THINK SOME OF THOSE [4] CONCERNS ARE VALID CONCERNS. I DON'T THINK ALL OF THEM ARE VALID CONCERNS.

BUT MY JOB IS TO LOOK AT WHAT IS BEST FOR THE MINOR CHILDREN, AND I DO THINK IT'S BEST FOR THE MINOR CHILDREN IN THIS SITUATION TO HAVE ACCESS TO THE GRANDMOTHER AND TO HAVE VISITATION WITH THE GRANDMOTHER.

BUT WITH SAYING THAT COMES A CAVEAT. I DO HEAR YOUR CONCERNS. I THINK, AND PLEASE DON'T TAKE THIS AS A CRITICISM BECAUSE I AM, BY FAR, NOT A PERFECT PERSON, AND IF SOMEBODY SAT DOWN AND CATALOGED MY FAULTS, I'M SURE THERE'D BE A LENGTHY LITTLE LIST. BUT I DO THINK AND THIS PLAYED INTO WHERE – MY REASONING, AND THAT'S THE ONLY REASON I BRING IT UP BECAUSE, PLEASE, DON'T THINK I SAY THIS AS CRITICISM. IT'S MY OBSERVATION. I THINK THAT YOU HAVE A TENDENCY, AND I'M GOING TO HAVE SOMETHING TO LEVEL AT YOU ALSO, MA'AM, BUT I THINK THAT YOU HAVE A TENDENCY TO WANT TO CONTROL THE SITUATION SUPREMELY. AND THAT'S JUST YOU. THAT'S HOW YOU ARE, BUT I THINK THAT SOME OF YOUR CRITICISMS THAT YOU LEVEL AT MS. DARCE ARE REALLY NOT NECESSARILY THINGS THAT SHE DOES AS MUCH AS YOU WANT TO CONTROL AND TO 99 PERCENT OF THE DEGREE IN YOUR RELATIONSHIP WITH YOUR CHILDREN YOU HAVE TO BE ABLE TO CONTROL THAT.

BUT I LOOK SPECIFICALLY TO SOME THINGS YOU SAID THAT KIND OF DISTURBED ME A LITTLE BIT. WELL, SOME OF THEM DISTURBED ME A LOT. WHEN YOU TALKED ABOUT THE RELATIONSHIP THAT YOU HAVE WITH THE BIRTH MOTHER, WHICH I THINK IS JUST WONDERFUL BECAUSE

THAT OPENS THE DOOR FOR ANOTHER SET OF FAMILY FOR THE MINOR, OR AT LEAST FOR MICHELLE, [5] BUT WHEN YOU TALKED ABOUT THAT RELATIONSHIP, YOU WENT ON TO SAY THAT YOU USED HER – MICHELLE'S WEEKEND VISITATION, FRIDAY NIGHT VISITATION, WITH HER BIRTH MOTHER ALMOST LIKE AS A SORT OF DAMOCLES THAT YOU HELD OVER HER HEAD FOR DISCIPLINE PROBLEMS. BECAUSE SPECIFICALLY YOU SAID I WILL DENY THAT ACCESS TO HER BIRTH MOTHER IF SHE DOESN'T GET AT LEAST A C AVERAGE. I'LL DENY THAT ACCESS TO THE BIRTH MOTHER IF SHE – YOU SAID SOMETHING ELSE. I HAD CHRIS NOTE IT IN THE TAPE, BUT RATHER THAN PLAY IT BACK, THOSE WERE MY NOTES, THAT YOU HELD IT OVER HER.

YOU CAN'T DO THAT, SIR. YOU CAN'T USE HER – THAT BABY'S RELATIONSHIP WITH A RELATIVE AS A METHOD OF DISCIPLINE. DISCIPLINE, LIKE I SAID MY PARENTS USED CORPORAL DISCIPLINE, BUT YOU CAN'T USE RELATIONSHIPS WITH THE CHILD BECAUSE THAT'S CUTTING OFF SOMETHING THAT I THINK AT THIS POINT IN HER LIFE IS VERY, VERY CRUCIAL AND IT'S VERY IMPORTANT TO HER.

AND YOU USED THAT SAME TYPE OF CONTROL IN YOUR RELATIONSHIP WITH SHIRLEY. THIS DISTURBED ME ALSO. APPARENTLY YOU HAD SHIRLEY SIGN A LETTER BACK IN OCTOBER OF 1997, AND I'M ONLY GOING TO PICK UP SOME OF THE THINGS THAT – I MEAN, YOU WROTE THE LETTER AND THEN HAD HER SIGN IT, AND IT'S IN THE DOCUMENT THAT I MEAN MS. PRATER REFERS TO IT AS THE BOOK, BUT IT WAS INTRODUCED AS

L.B. 4. YOU MADE SHIRLEY SAY – AND I'M READING DIRECTLY FROM THE LETTER – I HAVE NOT BEEN GOOD TO LEO. FURTHER, ANY WOMAN WOULD BE PROUD TO HAVE YOU AS A HUSBAND. YOUR CHARACTER AND INTEGRITY [6] RADIATE ALL AROUND YOU. I AM NOT VERY ATTRACTED TO HIM AS ANY WOMAN WOULD BE – OH, I'M SORRY. THAT WAS BEFORE AND THEN YOU WENT ON TO SAY I AM VERY ATTRACTED TO HIM AS ANY WOMAN WOULD BE. THEY NEED TO KNOW HOW THEIR FATHER FEELS ON VARIOUS MATTERS INCLUDING RELIGION, SCIENCE, SEX, MONEY, MATERIAL POSSESSIONS, AND MANY OTHERS. THEY HAVE BOTH A RIGHT AND A NEED TO UNDERSTAND HOW THEIR FATHER FEELS ABOUT VARIOUS THINGS. I WILL NEVER VIOLATE THIS RIGHT AND NEVER INTERVENE WHEN I SEE HIM SAYING SOMETHING AND I MIGHT DISAGREE WITH.

THOSE ARE JUST A FEW EXAMPLES OF YOU HAVE A NEED – OBVIOUSLY YOU HAD A CONFLICT WITH SHIRLEY. YOU WERE DIVORCED. BUT YOU HAD THAT NEED WHEN YOU MADE HER SIGN THAT LETTER, AND IT'S SIGNED BY HER AND YOU START OFF AT THE BEGINNING BY SAYING THAT YOU WANT HER TO SIGN IT. YOU HAVE THAT NEED TO FORCE SHIRLEY TO SAY THINGS THAT, IN FACT, YOU WANT HER TO SAY.

SIR, YOU'RE NOT ALWAYS GOING TO BE IN CONTROL. A LOT OF TIMES PEOPLE SAY TO ME, WHOA, YOU GOT SUCH A GREAT JOB, YOU CONTROL THE SITUATION. AND MY RESPONSE IS SIMILAR TO WHAT I WAS THINKING IS YOURS IN YOUR ROLE AS A PARENT. YOU'RE NOT GOING TO ALWAYS BE IN

CONTROL. A LOT OF THE TIMES YOU JUST CAN'T CALL ALL THE SHOTS. I FEEL THAT I GET KNOCKED DOWN ON A DAILY BASIS AND UNFORTUNATELY YOU'RE GOING TO BE KNOCKED DOWN A LOT AS A PARENT. YOU CAN'T ALWAYS CONTROL IT.

WITH THAT MUCH SAID, MS. DARCE, I WILL SAY FROM THE BEGINNING THAT WHEN I LOOK BACK, THERE'S SOME THINGS THAT I DISAGREE WITH THAT YOU MAY HAVE [7] DONE AND I WILL ADDRESS THOSE. BUT WHAT PUSHED ME TO SAY OVERWHELMINGLY THAT IT'S IN THE BEST INTEREST OF THE CHILDREN USING DR. KELLY'S CONTINUUM IS THAT THERE HAVE BEEN A NUMBER OF INSTANCES THAT CAME OUT IN ALL THE TESTIMONY IN WHICH YOU VERY ACTIVELY SAID TO MICHELLE, THIS IS YOUR DAD, YOU'VE GOT TO RESPECT HIM, YOU GOT TO LOVE HIM. MICHELLE APPARENTLY WANTED TO COME LIVE WITH YOU RIGHT AFTER HER MOM DIED. YOU SAID SORRY, SWEETS, IT AIN'T GOING TO HAPPEN THAT WAY, YOU GOT TO GO TO DAD.

SO I'M SAYING THAT TO YOU BECAUSE THAT IS THE TYPE OF BEHAVIOR THAT YOU HAVE TO HAVE WITH THE CHILDREN AND YOU NEED TO REALIZE, SIR, THAT SHE'S NOT OUT ALWAYS TO GET YOU. THERE ARE THINGS THAT I DON'T AGREE WITH, AGAIN, AND I'M GOING TO ADDRESS THOSE THINGS, BUT YOU NEED TO ALSO DWELL ON THE POSITIVE. MS. DARCE HAS ALSO ENCOURAGED THE CHILDREN TO LOVE YOU. MA'AM, YOU CANNOT INTERFERE IN ANY WAY, SHAPE OR FORM, AND I

FEEL VERY FIRMLY ABOUT THIS, WITH THEIR RELATIONSHIP WITH THE DAD.

THE REASON I SAY VISITATION IS IN THE BEST INTEREST OF THE CHILDREN IS BECAUSE I WANT THEM TO HAVE A CONTINUITY WITH THE FAMILY. I WANT THEM TO KNOW THEIR GRANDMOTHER. I WANT THEM TO KNOW THEIR MOM THROUGH THE GRANDMOTHER AND THAT IS A VERY POSITIVE BURDEN THAT'S PUT ON YOU. IT IS NOT A NEGATIVE BURDEN. IT WILL ONLY UNDERMINE THIS ENTIRE PROCESS IF YOU DIMINISH MR. BABIN'S AUTHORITY, IF YOU CUT HIM DOWN OR BELITTLE HIM IN FRONT OF THE CHILDREN. THAT IS NOT THE POINT OF [8] MY ORDERING THIS VISITATION.

BECAUSE OF WHAT'S HAPPENED IN THE PAST, IT'S VERY OBVIOUS THAT THE VISITATION – AND I DO THINK AND I KNOW THAT YOU SAID NO, MR. BABIN, BUT I DO THINK THAT THE MONEY TRIGGERED ALL OF THIS. I DON'T THINK THAT IT'S A COINCIDENCE THAT THE VISITATION CUT OFF IN AUGUST AND YOUR LETTER TO MS. ANDRESEN-MCCORMICK CAME IN SEPTEMBER, AND I'VE LOOKED THROUGH THE ENTIRE DOCUMENT AS L.B. 4 AND IT JUST COMES THROUGH LOUD AND CLEAR THAT THE MONEY WAS THE TRIGGER. IT MAY VERY WELL BE AND THIS IS PRETTY MUCH MY TAKE ON IT, THAT THE MONEY WAS THE LAST STRAW TO YOU; THAT YOU SAW THAT AS THE FAMILY WAS JUST GOING TO RUN IT THEIR WAY AND THEY WERE TAKING THE MONEY AND THEY WERE GOING TO DO WITH THE MONEY WHAT THEY WANTED TO DO AND YOU SAW THAT AS THE FINAL

STRAW. THAT MAY BE HOW IT WENT, BUT IN ANY EVENT, IT WAS THE MONEY.

WITH THAT SAID, VISITATION WITH THE MINOR CHILDREN HAS TO START SLOWLY BECAUSE I'M ORDERING COUNSELING AND THERAPY FOR EACH OF YOU. IT HAS TO BE FOR THE BEST INTEREST OF THE CHILDREN SINCE MY GOAL IS TO HAVE THESE CHILDREN HAVE WHAT IS BEST FOR THEM. IT'S OBVIOUS TO ME IT'S NOT GOING TO HAPPEN WITHOUT SOME TYPE OF COUNSELING. I CAN'T USE ANY OF THE WONDERFUL PROFESSIONALS WHO WERE IN MY COURTROOM TODAY. IT HAS TO BE A THIRD PERSON. I'M ORDERING DR. ALAN TAYLOR TO DO THIS COUNSELING. AND, AGAIN, IT'S SOLELY FOR THE BEST INTEREST OF THE CHILDREN FOR YOU TO DEVELOP SOME TYPE OF AT LEAST WORKING RELATIONSHIP WITH THE MINOR CHILDREN FOR EACH OF YOU.

[9] VISITATION STARTS OFF AT FOUR HOURS. IT CAN INCREASE AS DR. TAYLOR RECOMMENDS. MY GOAL WOULD BE TO BE AT AN OVERNIGHT VISITATION WITHIN SIX MONTHS WITH THE GRANDPARENTS. THE FOUR HOURS AT THIS POINT I WOULD RECOMMEND BEING EVERY THREE WEEKS. OR CAN'T RECOMMEND. IT'S A COURT ORDER THAT IT WOULD BE EVERY THREE WEEKS. IT WOULD BE ON A WEEKEND. IT HAS TO BE AROUND THE CHILDREN'S SCHEDULE BECAUSE THE CHILDREN HAVE LIVES OF THEIR OWN AT THIS POINT. MICHELLE CERTAINLY IS A TEENAGER, HAS EVEN MORE OF A LITTLE SOCIAL ACTIVITY SCHEDULE. AT THAT POINT, WITH THAT MUCH SAID, I'M GOING TO LEAVE

IT TO DR. TAYLOR, WHO I TRUST VERY MUCH, TO RECOMMEND ANY INCREASES FROM THERE.

ANY QUESTIONS? YOU NEED TO ASK YOUR ATTORNEY. THAT WAS DIRECTED TO THE ATTORNEYS. DO THE ATTORNEYS HAVE ANY QUESTIONS? DID I LEAVE ANYTHING OUT?

MS. [sic] **HUBBELL:** YOUR HONOR, ONE QUESTION, MR. BABIN INFORMED ME THAT HIS INSURANCE DOESN'T PAY FOR THE COURT-ORDERED COUNSELING. DOES YOUR HONOR HAVE ANY OTHER SOLUTION TO THAT? I MEAN, –

THE COURT: NO. IT HAS TO BE – ABSOLUTELY HAS TO BE COUNSELING. I'M AGREEABLE TO LOOKING AT – AND I WANT A PSYCHOLOGIST – TO LOOKING AT – AND I DON'T MEAN THAT WITH ANY DISRESPECT TO YOU, MS. APPLETON. I SEE BIGGER PROBLEMS HERE THAN – I THINK I NEED A PSYCHOLOGIST. YOU CAN GIVE ME A LIST OF PSYCHOLOGISTS. IF THERE'S NOBODY – I THINK DR. TAYLOR, FOR A LOT OF REASONS, I KNOW DR. TAYLOR'S WORK VERY WELL AND I TRY TO TAILOR A [10] PSYCHOLOGIST OR A SOCIAL WORKER TO A SPECIFIC PROBLEM. THAT WAS WHY I CHOSE HIM. SO IF YOU GIVE ME A LIST OF PEOPLE WHO ARE APPROVED AND I FIND SOMEBODY ELSE ON THAT LIST THAT I THINK CAN ADDRESS THIS SPECIFIC PROBLEM, I'M MORE THAN HAPPY TO CONSIDER SOMEBODY ELSE. BUT IF I DON'T –

MS. [sic] **HUBBELL:** EXCUSE ME, YOUR HONOR. I THINK WHAT HE'S SAYING IS THAT HIS EMPLOYER – IF IT'S COURT ORDERED, HIS EMPLOYER WON'T COVER IT.

THE COURT: I'VE FOUND THAT IT'S JUST THE OPPOSITE.

MR. BABIN: I DON'T MIND CALLING THEM UP.

THE COURT: WELL, IT'S A COURT ORDER.

MS. PRATER: WE'LL MAKE GOOD WHATEVER NEEDS TO BE DONE.

THE COURT: THE ONLY WAY AROUND THAT IS IF YOU SIT HERE AND TELL ME YOU'LL VOLUNTARILY DO IT AS LONG AS THE PSYCHOLOGIST SAYS.

MR. BABIN: WELL, I'VE BEEN SEEING MR. GOOCH AND I'M CONTINUING TO SEE MR. GOOCH. I HAVE CONTINUING APPOINTMENTS WITH HIM BY MYSELF. I'VE BEEN –

THE COURT: BUT THE PROBLEM IS, YOU'VE BEEN IN COUNSELING AND YOU STILL DON'T WANT VISITATION. THAT'S WHY I'M NOT OPENING THIS QUESTION. THIS IS NOT A QUESTION AND ANSWER PERIOD. I'M MORE THAN WILLING – I'VE RULED ON THE CASE. I'M MORE THAN WILLING TO CONSIDER AN ALTERNATIVE TO DR. TAYLOR, BUT OBVIOUSLY, SIR, THAT COUNSELING HADN'T WORKED BECAUSE HERE WE'VE SAT THROUGH A FOUR-DAY TRIAL. SO PICK ANOTHER – IF YOU'VE GOT A LIST OF PSYCHOLOGISTS, IF YOU CAN THINK OF A WAY TO GET [11] THE INSURANCE TO COVER IT, MR. HUBBELL, I'M MORE THAN WILLING TO CONSIDER THAT.

MS. [sic] **HUBBELL:** IT'S A MONEY ISSUE, YOUR HONOR.

THE COURT: RIGHT. AND I'M MORE THAN WILLING TO WORK WITH YOU TO GET A WAY FOR THE INSURANCE TO COVER IT, BUT I'M ADAMANT THAT IT'S GOING TO BE SOMEBODY NEW. I'M ADAMANT ABOUT THAT, BUT I WILL WORK WITH YOU ON GETTING THE INSURANCE TO COVER IT.

MS. [sic] **HUBBELL:** THANK YOU, YOUR HONOR.

THE COURT: YOUR WELCOME.

MS. PRATER: THANK YOU, YOUR HONOR.

[12] CERTIFICATE

I, CHRIS B. RHODUS, OFFICIAL COURT REPORTER, IN AND FOR THE FAMILY COURT OF EAST BATON ROUGE PARISH, STATE OF LOUISIANA, DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING PAGES OF TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE REPRESENTATION OF THE PROCEEDINGS HELD HEREIN IN THIS MATTER, TO THE BEST OF MY ABILITY AND UNDERSTANDING.

BATON ROUGE, LOUISIANA, THE 5TH DAY OF OCTOBER, 2001.

[SEAL]
OFFICIAL SEAL
CHRIS B. RHODUS
Official Court Reporter
in and for the State of
Louisiana
Certificate Number 85141
Commission expires 12-31-02

/s/ Chris B. Rhodus
CHRIS B. RHODUS
OFFICIAL COURT
REPORTER
FAMILY COURT
EAST BATON ROUGE
PARISH
CCR #85141

NOTICE OF RENDITION OF JUDGMENT AND WRITTEN REASONS

LEO JOSEPH BABIN, JR.
VERSUS
SHIRLEY ANN SCHILLING BABIN

NUMBER 126,676; DIV. "D"
THE FAMILY COURT
EAST BATON ROUGE PARISH
STATE OF LOUISIANA

(Filed Sept. 24, 2001)

TO: Michael R. Hubbell and Lisa M. Prater

GREETINGS:

You are hereby notified that a decision was rendered and spread on the minutes of the Family Court on the 24th day of September, 2001, in the above entitled and numbered cause, and the following is a true copy of the entry of said decision.

The above matter came on for trial on June 25, and 27, 2001 pursuant to a "Rule to Establish Grandparent Visitation Pursuant to La. R.S. 9:344" filed by Ms. Sylvia Darce. Prior to trial, on June 22, 2001, Mr. Babin filed an "Answer to Rule To Establish Grandparent Visitation Pursuant to La. R.S. 9:344" which incorporates peremptory exceptions of no cause of action and the unconstitutionality of R.S. 9:344.

Prior to commencing trial on June 25, 2001, this court ruled on the constitutional issue, denying Mr. Babins' exception. In connection with its ruling, the court made a part of the record in the above matter written reasons for judgment rendered in the matter of Phyllis Jackson versus

Alysha Kennedy Jackson, suit number 112,404, Division D of the Family Court for the Parish of east Baton Rouge, adopting and incorporating by reference those written reasons as written reasons for judgment denying Mr. Babin's peremptory exception of the unconstitutionality of Louisiana R.S. 9:344 as written. This court also cited the first circuit case of *Galjour v. Harris*, 2000-2696 (La.App. 1 Cir. 3/28/01) 2001 WL 293689, *writ denied* by *Galjour v. Harris*, 2001-1238 (La. 6/1/01) 2001 WL 293689, wherein the first circuit rejected defendant's assertion that La. R.S. 9:344(A) is unconstitutional. Mr. Babin's exception of no cause of action was pretermitted.

On September 7, 2001, Mr. Babin filed a Motion For Involuntary Dismissal and a memorandum in support thereof. Ms. Darce filed a Memorandum in Opposition To Motion For Involuntary Dismissal on September 18, 2001.

I. EXCEPTION OF NO CAUSE OF ACTION

Mr. Babin's exception of no cause of action is based on his assertion that Ms. Darce failed to allege "serious circumstances" in her rule requesting visitation pursuant to La. R.S. 9:344. Mr. Babin's exception is denied as this court finds that Ms. Darce is not required to allege nor prove "serious circumstances" in order to prevail. The court notes that the jurisprudence relied on by Mr. Babin in this respect consists of proceedings involving termination of parental rights by the State. The court need not belabor the obvious. Suffice it to say that proceedings involving termination of parental rights are vastly different from proceedings to establish visitation rights. as stated in *Galjour v. Harris*, "the statute's grant of visitation does not contemplate a significant intrusion upon the

child's relationship with the other parent or interference with said parent's fundamental right to make childrearing decisions". Neither the statute itself, nor any jurisprudence on point requires a showing of "serious circumstances". This court further adopts and incorporates into these written reasons Ms. Darce's legal argument contained in both her pre-trial memorandum and memorandum in opposition to motion for involuntary dismissal regarding this point. For all of these reasons, Mr. Babin's exception is denied.

II. MOTION FOR INVOLUNTARY DISMISSAL

La. C.C.P. Article 1672(B) states that:

> "In an action tried by the court without a jury, ***after the plaintiff has completed the presentation of his evidence***, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence." (Emphasis added)

Counsel for Ms. Darce stated at the close of trial on June 27, 2001 that she "rested subject to calling Dr. Fain", a witness listed on Sylvia Darce's Amended Pretrial Order. As such, Ms. Darce has not completed the presentation of her evidence and this court finds that Mr. Babin's Motion For Involuntary Dismissal is premature.

III. BURDEN OF PROOF

Although this issue is raised in connection with Mr. Babin's Motion For Involuntary dismissal which was rejected by this court as being premature, this court is prepared to rule on the appropriate burden of proof in this case. This court rejects Mr. Babin's assertion that the burden to be applied in this case is a showing by "clear and convincing evidence" as unsupported by the law and jurisprudence. Again, this court adopts and incorporates into these written reasons Ms. Darce's legal argument contained in both her pre-trial memorandum and memorandum in opposition to motion for involuntary dismissal regarding this point. This court finds that the appropriate burden of proof is a showing by a "preponderance of the evidence" that visitation would be in the best interest of the children. However, this court rejects the suggestion made by Ms. Darce that *Mr. Babin* must carry the burden of proof in this matter. An application of the burden of proof in this manner would almost certainly result in an unconstitutional application of La. R.S. 9:344. *Troxel v. Granville*, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Clearly, Ms. Darce must carry the burden of proof in this case.

Thus done, signed and mailed at Baton Rouge, Louisiana, on this 24th day of September, 2001.

/s/ Annette M. Lassalle
Annette M. Lassalle, Judge
The Family Court
Division "D"

The Supreme Court of the State of Louisiana

LEO JOSEPH BABIN, JR.

VS. NO. 2003-C-2460

SHIRLEY ANN SCHILLING BABIN

IN RE: Babin, Leo Joseph Jr.; – Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, The Family Court, No. 126, 676; to the Court of Appeal, First Circuit, No. 2002 CA 0396

September 24, 2003

Denied.

CDK

PFC

BJJ

CDT

JTK

JLW

VICTORY, J., would grant the writ.

Supreme Court of Louisiana
September 24, 2003

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

ENROLLED

Regular Session, 2001

HOUSE CONCURRENT RESOLUTION NO. 68

BY REPRESENTATIVE BOWLER

A CONCURRENT RESOLUTION

To direct the Louisiana State Law Institute to study the effect of the United States Supreme Court case of *Troxel v. Granville* on Louisiana laws relative to child visitation and to make specific recommendations on or before January 1, 2003, for revisions to state laws to ensure that state laws are not contrary to the fundamental rights of parents to make decisions concerning the care, custody, and control of their children.
WHEREAS, the United States Supreme Court has ruled in the case of

Troxel v. Granville, 120 S.Ct. 2054 (2000), that a Washington state statute, which provided for visitation rights of children, violated certain constitutional rights of parents; and

WHEREAS, Louisiana has several laws regarding the visitation rights of children, including Civil Code Article 136, Children's Code Article 1264, and R.S. 9:344; and

WHEREAS, while the United States Supreme Court rested its decision on the sweeping breadth of the Washington state statute, the court emphasized that one of the oldest of the fundamental interests recognized by the court was the right of parents, whose fitness has not been questioned and who are presumed to act in the best interests of their children, to make decisions concerning

the care, custody, and control of their children without the state injecting itself into the private realm of the family.

THEREFORE, BE IT RESOLVED by the Legislature of Louisiana that the Persons Committee of the Louisiana State Law Institute study the effect of the United States Supreme Court case of *Troxel v. Granville* on Louisiana laws relative to child visitation and to make specific recommendations for revisions to state laws to ensure that state laws are not contrary to the fundamental rights of parents to make decisions concerning the care, custody, and control of their children.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute and that the Louisiana State Law Institute report its findings and recommendations to the legislature on or before January 1, 2003.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

HCR68 By BOWLER

CHILDREN/VISITATION RGTS: Directs the Louisiana State Law Institute to study the effect of the United States Supreme Court case of Troxel v. Granville on Louisiana law relative to child visitation

Date	Chamber	Page	Action
06/07	H	0	Taken by the Clerk of the House and presented to the Secretary of State in accordance with the Rules of the House.

05/30	S	46	Signed by the President of the Senate.
05/29	H	39	Enrolled and signed by the Speaker of the House.
05/29	H	1	Received from the Senate without amendments.
05/24/	S	44	Read by title and concurred in by the vote of 36 yeas and 0 nays and ordered to the House.
05/22	S	53	Rules suspended; reported favorably.
05/10	S	38	Received in the Senate. Rules suspended read first and second time by title and referred to the committee on JUDICIARY A.
05/10	H	30	Read by title, roll called on final consideration, yeas 98, nays 1. The resolution was adopted and ordered to the Senate.
05/10	H	30	Called from the calendar.
05/08	H	20	Read by title, returned to the calendar subject to call.
04/24	H	16	Read by title, amended, ordered engrossed, passed to 3rd reading.
04/23	H	43	Reported favorably (6-0) ( )
04/10	H	4	Read by title, under the rules, referred to the Committee on CIVIL LAW&PROCEDURE.
04/09	H	37	Read by title, lies over under the rules.

ENROLLED

Regular Session, 2003

HOUSE CONCURRENT RESOLUTION NO. 38

BY REPRESENTATIVE BOWLER

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute, Marriage/Persons Committee to study Louisiana's visitation statutes and make specific recommendations on or before January 15, 2004, for revisions to state laws.

WHEREAS, the Louisiana State Law Institute submitted its report on the effect of the United Stats Supreme Court decision in *Troxel v. Granville* on Louisiana's third-party visitation statutes in response to House Concurrent Resolution No. 68 of the 2001 Regular Session; and

WHEREAS, the report concludes that Louisiana's visitation statutes, Civil Code Article 136(B), R.S. 9:344, and Children's Code Article 1264 are constitutional on their face but may be unconstitutional in application to particular litigation; and

WHEREAS, the report also describes the various visitation statutes as scattered in disparate locations and by virtue of piecemeal amendments insufficiently respectful of a parent's constitutional right to rear his or her own children; and

WHEREAS, the current content of the visitation statutes fail in some cases to make logical distinctions in substantive standards to be applied by the Court on the basis of degree of interference in the family life of parents and children.

THEREFORE, BE IT RESOLVED by the Legislature of Louisiana that the Marriage/Persons Committee of the Louisiana State Law Institute study the aforementioned visitation statutes for the purpose of recommending revisions prior to the 2004 Regular Session.

BE IT FURTHER RESOLVED that a copy of this Resolution by transmitted to the director of the Louisiana State Law Institute and that the Marriage/Persons Committee make specific recommendations for revision of third-party visitation statutes to the legislature on or before January 15, 2004.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

HCR38 By BOWLER

CHILDREN/VISITATION RGTS:Urges the Marriage/ Persons Committee of the Louisiana State Law Institute to study child visitation laws

Date	Chamber	Page	Action
06/23	H	0	Taken by the Clerk of the House and presented to the Secretary of State in accordance with the Rules of the House.
06/09	S	0	Signed by the President of the Senate.
06/09	H	59	Enrolled and signed by the Speaker of the House.
06/05	H	50	Received from the Senate without amendments.

06/05	S	0	Read by title and concurred in by the vote of 34 yeas and 0 nays and ordered to the House.
06/03	S	8	Reported favorably.
05/15	S	36	Received in the Senate. Rules suspended read first and second time by title and referred to the committee on JUDICIARY A.
05/15	H	18	Read by title, adopted, ordered to the Senate.
05/12	H	6	Read by title, ordered engrossed passed to 3rd reading.
05/08	H	48	Reported favorably (8-0) ( )
04/01	H	9	Read by title, under the rules, referred to the Committee on HOUSE & GOV AFFAIRS.
03/31	H	7	Read by title, lies over under the rules.

LOUISIANA STATE LAW INSTITUTE
PAUL M. HEBERT LAW CENTER, ROOM W127
UNIVERSITY STATION
BATON ROUGE, LA 70803-1016

[SEAL]
OFFICE OF
THE DIRECTOR
(225) 578-0200
FAX (225) 578-0211
E-MAIL: LAWINSTITUTE@LSLI.ORG

March 25, 2003

Senator John Hainkel, Jr.
President of the Senate
P.O. Box 94183
Capitol Station
Baton Rouge, Louisiana 70804

Representative Charles W. DeWitt
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

Representative Shirley D. Bowler
1939 Hickory Avenue, Suite 203
Harahan, Louisiana 70123

RE: HCR NO. 68 OF 2001

Dear Mr. President, Mr. Speaker and Ms. Bowler:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature in accordance with HCR No. 68 of 2001 to study, "the constitutionality of Louisiana visitation statutes."

Sincerely,

/s/ William E. Crawford
William E. Crawford
Director

WEC/puc

Enclosure

05/28/03 WED 15:30 [TX/RX NO 5100]

LOUISIANA STATE LAW INSTITUTE
PAUL M. HEBERT LAW CENTER, ROOM W127
UNIVERSITY STATION
BATON ROUGE, LA 70803-1016

[SEAL]
(225) 578-0200
FAX (225) 578-0211
E-MAIL: LAWINSTITUTE@LSLI.ORG
WWW.LSLI.ORG

HCR NO. 68 OF 2001 REGULAR SESSION REPORT FROM THE PERSONS COMMITTEE

In response to House Concurrent Resolution No. 68, the Persons Committee and Council of the Louisiana State Law Institute request further time to study possible statutory language that would be constitutionally consistent with *Troxel v. Granville*, 120 S. Ct. 2054 (2000) and that would guide the judiciary in applying Louisiana's three third-party visitation statutes.

In *Troxel v. Granville, supra*, the United States Supreme Court concluded that a "breathtakingly broad" visitation statute of the state of Washington was unconstitutionally *applied* by the lower state courts. Although the statute was not unconstitutional on its face, the Court concluded nonetheless that, as applied, the Washington court denied to a fit parent her constitutional right of privacy to make decisions affecting her child without undue interference by the state. Louisiana's three visitation statutes located in the Civil Code, Civil Code Ancillaries and the Children's Code are all narrower in scope than the Washington statute in at least one respect: only certain classifications of people who are related to a child may seek visitation. Therefore, the Louisiana statute

is constitutional on its face but may be, as was true in the Washington case, unconstitutionally applied in certain factual situations. *See* Wood v. Wood, 835 So. 2d 568 (La. App. 1 Cir. 2002).

While examining the three statutory bases of visitation in Louisiana, however, the Persons Committee discovered certain inconsistencies in the statutory standards for awarding visitation in different factual contexts. In some statutes there are higher thresholds and standards to be applied under circumstances where the interference with a parent's privacy right is less intrusive than other situations with lower thresholds and standards. Because the judiciary may benefit by logical consistency among and greater statutory guidance in the visitation statutes, the Persons Committee and the Council of the Law Institute request additional time to study revisions to the visitation statutes and report to the Legislature immediately prior to the 2004 Regular Session of the Legislature.

Respectfully submitted,

Katherine Shaw Spaht
Reporter, Persons Committee
Louisiana State Law Institute

THE FAMILY COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DIVISION D

LEO JOSEPH BABIN, JR.
VERSUS 126,676
SHIRLEY ANN SCHILLING BABIN

TRIAL
MONDAY, SEPTEMBER 24, 2001
THE HONORABLE ANNETTE M. LASSALLE,
JUDGE PRESIDING

APPEARANCE:	FOR:
MICHAEL HUBBELL	PLAINTIFF
LISA PRATER	SYLVIA DARCE

REPORTER BY: CHRIS B. RHODUS, R.P.R., C.C.R.

* * *

[25] **MS. PRATER**: YOUR HONOR, THAT'S ALL I HAVE. I WOULD JUST LIKE TO GO AHEAD AND INTRODUCE INTO EVIDENCE DR. FAIN'S RESUME.

MR. HUBBELL: I DON'T HAVE ANY OBJECTION.

THE COURT: THANK YOU. LET IT BE ADMITTED. IS DR. FAIN FREE TO LEAVE?

MS. PRATER: ACTUALLY IF MR. HUBBELL IS PLANNING ON CALLING PAT APPLETON, I WOULD LIKE HIM TO REMAIN IN THE COURTROOM TO HEAR HER TESTIMONY.

THE COURT: THANK YOU, DOCTOR. IF YOU JUST WANT TO TAKE A SEAT IN THE COURTROOM, PLEASE.

A. SURE. NICE MEETING YOU.

THE COURT: THANK YOU. IT WAS GOOD TO MEET YOU ALSO. YOU REST?

MS. PRATER: YES, YOUR HONOR.

THE COURT: YOU CAN CALL YOUR FIRST WITNESS, MR. HUBBELL.

MR. HUBBELL: YOUR HONOR, BEFORE I DO THAT, JUST FOR THE RECORD, I'D LIKE TO REASSERT MY MOTION FOR INVOLUNTARY DISMISSAL WHICH I UNDERSTAND THE COURT HAS ALREADY RULED ON AND HAS BEEN DENIED AND ONE OF THE BASES IS BEING PREMATURE BECAUSE DR. FAIN HAD TO TESTIFY AND I UNDERSTOOD THAT HE WOULD BE CALLED ON REBUTTAL. SO NOW THAT HE'S TESTIFIED AND COUNSEL HAS RESTED HER CASE COMPLETELY, I'D RE-URGE THAT MOTION.

MS. PRATER: WELL, DO I NEED TO MAKE ARGUMENT?

MR. HUBBELL: YOUR HONOR, IT'S JUST FOR THE RECORD.

THE COURT: WHY DON'T YOU RESPOND JUST FOR THE RECORD.

–[26] **MS. PRATER**: OKAY.

THE COURT: YOU DON'T HAVE TO, MS. PRATER. I ANTICIPATED YOUR MAKING THIS MOTION ONCE AGAIN AND I KNOW YOU DID, YOU READ THE MEMO WHICH WILL BECOME PART OF THIS RECORD. MY RULING DID NOT DEAL SOLELY WITH THE ISSUE OF PREMATURITY. IT DEALT WITH THE BURDEN OF PROOF, AND THE COURT FINDS EVEN AT THIS POINT AS YOU RE-URGE YOUR MOTION THAT THE BURDEN OF PROOF HAS NOT, IN FACT – HAS BEEN CARRIED AS FAR AS MS. PRATER IS TO OPEN THE DOOR; THEREFORE, YOU NEED TO RESPOND.

MR. HUBBELL: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME.

MR. HUBBELL: YOUR HONOR, LET'S SEE IF DR. KELLY IS HERE. SHE HAD TO LEAVE AND GO TO LSU. SHE SAID SHE'D BE BACK BY 11:00.

THE COURT: OH, SURE. BUT FOR THE RECORD, COUNSEL, CERTAINLY THE BURDEN OF PROOF, THE TOTALITY OF THE CASE IS NOT CONCLUSIVELY BEEN FOUND. I DO, HOWEVER, FIND THAT THE THRESHOLD BURDEN HAS BEEN MET – WANT TO MAKE THAT REALLY CLEAR – FOR THE DOOR TO BE OPENED SINCE WE HAD THESE

DISCUSSIONS IN MY OFFICE BEFORE WE STARTED THIS TRIAL. I WANT TO MAKE THAT PART OF THE RECORD THAT THE THRESHOLD WAS AT LEAST THERE. WE'VE GOT THE DOOR OPEN.

MR. HUBBELL: SO THE BURDEN SHIFTS NOW?

THE COURT: CORRECT.

MR. HUBBELL: YOUR HONOR, WE CALL MS. APPLETON.

THE COURT: COME UP AND RAISE YOUR RIGHT HAND, PLEASE MA'AM.

* * *

La. R.S., Title 9

§ 344. Visitation rights of grandparents and siblings

A. If one of the parties to a marriage dies, is interdicted, or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted, or incarcerated party without custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

B. When the parents of a minor child or children live in concubinage and one of the parents dies, or is incarcerated, the parents of the deceased or incarcerated party may have reasonable visitation rights to the child or children during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

C. If one of the parties to a marriage dies or is incarcerated, the siblings of a minor child or children of the marriage may have reasonable visitation rights to such child or children during their minority if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

D. If the parents of a minor child or children of the marriage are legally separated or living apart for a period of six months, the grandparents or siblings of the child or children may have reasonable visitation rights to the child or children during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

Acts 1993, No. 261, § 5, eff. Jan. 1, 1994. Amended by Acts 1999, No. 1352, § 1.